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Supreme Court, U.S.
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No. 01-1744

In The
Supreme Court of the United States

COUNTY OF HUMBOLDT, *et al.*,

Petitioners,

v.

HEADWATERS FOREST DEFENSE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether *Saucier v. Katz* requires that courts dismiss as a matter of law all excessive force claims, even where there are genuine issues of material fact and substantial, admissible evidence establishes that officers violated clearly established constitutional rights.

2. Whether a reasonable jury could conclude, based on the extensive evidence presented in this case, that applying a chemical known to cause excruciating pain to the eyes and faces of passive demonstrators, who presented no danger to themselves or others, constituted an unreasonable use of force under *Graham v. Connor*.

LIST OF PARTIES

Respondents agree that the list of parties presented in the petition (Pet. at ii) is accurate and complete.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Headwaters Forest Defense, *et al.* (collectively, "demonstrators"), respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to U.S. CONST. amend. IV and 42 U.S.C. § 1983, cited by Petitioners, this case also involves FED. R. CIV. P. 50, which states in pertinent part:

> "(a)(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim . . . that cannot under controlling law be maintained or defeated without a favorable finding on that issue."

STATEMENT OF THE CASE

A. Procedural Summary

This is the second petition for a writ of certiorari in this case. The original petition was pending when this Court decided *Saucier v. Katz*, 533 U.S. 194 (2001), a case concerning qualified immunity in excessive force cases. At that point, the Court vacated the circuit court's original decision and, without opinion, remanded to the Ninth Circuit for reconsideration in light of *Saucier*.

The County defendants' new petition raises two issues. The first is that, although the circuit court's revised opinion considered and applied *Saucier*, that court reached the wrong conclusion. The second is based primarily on a former conflict among the federal courts of appeal over what constitutes a "clearly established right" for purposes of qualified immunity. That conflict was recently resolved by this Court's opinion in *Hope v. Pelzer*, 122 S. Ct. 2508 (2002).

This proceeding stems from the claims of nine environmental demonstrators that seven individual police officers, their police departments, and the relevant city and county used excessive force while arresting the demonstrators for trespass during three peaceful, symbolic protests. Plaintiffs sued under 42 U.S.C. § 1983, alleging violations of their Fourth Amendment rights. Their claims against five of the officers were dismissed early in the district court proceedings on grounds of qualified immunity, and there have been no subsequent proceedings against those officers. The case went to trial against the city, county, and two remaining supervisory officers, Humboldt County Sheriff Lewis and Chief Deputy Philp. At the close of plaintiffs' case in chief, the district court ruled that Lewis and Philp were also entitled to qualified immunity as a matter of law and dismissed the claims against them. After the nine-day trial ended, the jury deadlocked on the claims against the city and county. The district court declared a mistrial and set a new trial date. Shortly before that date, however, the district court entered judgment as a matter of law for the remaining defendants pursuant to FED. R. CIV. P. 50. (Pet. App. D at 54a). The demonstrators appealed the dismissal of only their claims against the county, city, Sheriff Lewis, and Chief Deputy Philp.

After a detailed review of the trial record, the Ninth Circuit concluded there was sufficient evidence on which a rational jury could reach a verdict in favor of the demonstrators and remanded to the district court for a new trial. (Pet. App. C at 15a). As required in a review of a Rule 50 judgment, the Ninth Circuit viewed the evidence in the light most favorable to the plaintiffs. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000); *accord Saucier v. Katz*, 533 U.S. 194, 201 (2001) (same standard under Rule 55). The court of appeals observed that the district court had failed to apply the correct standard and that the district court's decision was "replete with assertions that the weight of the evidence favors the defendants and with conclusions the court reached by resolving conflicts in the evidence *against* the nonmoving parties." (Pet. App. C at 30a).

The first petition for certiorari followed, but while that petition was pending, this Court decided *Saucier v. Katz*. The Court granted the petition for certiorari and remanded for the Ninth Circuit to reconsider its decision in light of *Saucier*. The Ninth Circuit again reviewed the factual record, applied the standards articulated in *Saucier* to the qualified immunity issue, and issued a new opinion. (Pet. App. A at 1a). The County defendants now seek review of that opinion.

B. Factual Background

The demonstrators locked themselves together in the office of a Congressman, at a timber company, and between the treads of a bulldozer used in logging in order to protest the logging of ancient redwood trees in the Headwaters Forest, located along California's northern coast. Although the demonstrators were immobilized and posed no threat to themselves or others, the officers deliberately swabbed

oleoresin capsicum (sometimes called "OC" or "pepper spray") onto the demonstrators' eyelids, sprayed OC into their eye sockets and faces from inches away, and, in at least one instance, pulled open a demonstrator's eye and swabbed the chemical directly onto her eyeball.

The OC applications inflicted excruciating pain on the demonstrators. *See, e.g.*, Riggs Video (one officer inadvertently describes as "torture"). OC is designed to cause intense, burning, debilitating pain when sprayed toward an attacker. *E.g.*, ER 2-225-226 & 2-230, 235-236 (Hanson). Police and prison guards use the chemical, spraying it from several feet or yards away, to quickly disable aggressive, violent inmates or criminals. *E.g.*, ER 2-230; ER 2-238; ER 2-494. Even applied from a distance, the chemical can quickly immobilize and disorient large, belligerent attackers or wild animals such as bears. *E.g.*, ER 2-230-231; ER 2-478-479.

The defendants in this case used OC in a manner that is unique and shocking. First, the police forced the demonstrators' faces upward by pulling the demonstrators' heads or hair backwards. *E.g.*, ER 3-571 (head held against policeman's thigh); ER 3-632; ER 3-607; ER 5-1064-1066; Videos. Then, the police used Q-tips soaked with OC to swab the chemical *directly* onto the closed eyes of the demonstrators. *E.g.*, ER 2-293-294; ER 3-608. In one instance, at least, as one of the demonstrators moaned, "Ow! Don't open it!", police swabbed the chemical directly onto the surface of her eye. ER 3-675-676 (Schneider); Riggs Video. At least three times, the police sprayed the chemical – from inches away – directly onto the eyes of demonstrators, until it ran from the demonstrators' eye sockets. Riggs Video; Bear Creek Video; ER 4-971; ER 5-1066. The chemical quickly seeped into eyeballs, into noses

and mouths, and onto other parts of the demonstrators' faces and bodies. *E.g.*, ER 3-668 (down face and into mouth); ER 2-352.

Applied directly to the eyelids and eyes of the demonstrators and seeping or running into their noses and mouths and onto other parts of their bodies, the chemical inflicted terrible pain. *E.g.*, ER 5-1063 (police said "Let your friends know what this feels like"); ER 4-839. The demonstrators screamed in pain and begged the police to stop hurting them. *E.g.*, ER 5-1064 (screamed); ER 5-1066 (pleaded). A 17-year old woman, Spring Lundberg, described the initial impact of the OC on her:

> Q. WHAT WAS THE IMPACT? WHAT DID THAT FEEL LIKE ON YOUR EYES?
>
> A. AT FIRST IT WAS JUST WET, AND I WAS SO SCARED. AND THEY WERE PULLING MY HEAD BACK AND SWABBING MY EYE, AND I WAS JUST TRYING TO BREATHE. AND THEN IT STARTED BURNING AND MORE – BURNING MORE AND MORE BURNING. IT FELT LIKE PRETTY SOON I WOULDN'T HAVE ANY SKIN LEFT ON MY EYES. AND AROUND MY EYES, THERE WAS SO MUCH PAIN, THE MOST PAIN I'VE EVER FELT.

ER 2-293. The shock and the chemical itself made it difficult for the demonstrators to breathe. *E.g.*, ER 2-293 to 294; ER 3-609; ER 3-668-669; ER 4-970-971.

There was also testimony that the pain caused by OC continued for many hours after a subject had complied with the desires of the police. Schneider, ER 3-700 (unlike a pressure hold or other "pain compliance" technique). For example, Ms. Slanetz testified:

> Q. HOW LONG WAS IT BEFORE YOU COULD OPEN YOUR EYES?

> A. SEVERAL HOURS ON THE EYE THAT HAD BEEN SWABBED. AND WHERE I HAD RECEIVED THE SPRAY, I COULD NOT OPEN THAT EYE. I TRIED THAT EVENING. AND IT WAS EXTREMELY PAINFUL, AND I COULD NOT OPEN IT UNTIL THE NEXT MORNING, AND EVEN THEN, THINGS WOULD FALL OR HIT MY EYE AGAIN, AND IT WOULD CREATE THE PAIN AGAIN.

ER 5-1067; *accord* ER 2-294; ER 5-1067 (many hours); ER 2-355 (continued pain); ER 2-359 (eyes inflamed for hours).

The record also shows that the demonstrators experienced prolonged emotional and psychological injuries from the OC applications. *E.g.*, ER 2-296 (Lundberg – panic attacks); ER 3-577-578 (Sanderson-Fox – emotionally fragile, cries frequently for no reason); ER 3-616 (Neuwirth – depressed, emotional all the time, feeling of being violated); ER 3-635-636 (Burton – fear and sadness, nightmares); ER 5-1069 (Slanetz – emotionally sensitive, nightmares, less trusting, fear of police).

Although it is undisputed that defendants knowingly inflicted great pain on the demonstrators by using OC, there is little or no evidence that the use of OC accomplished any legitimate governmental purpose. The use of OC actually prolonged the arrests. (Pet. App. C at 39a-40a, 46a) (compared to using small grinding tool, OC applications prolonged removal of demonstrators). Moreover, there is little or no evidence to support the government's other purported justifications for the use of OC. The demonstrators' actions appear to have caused, at most, mild inconvenience at the three sites. ER 3-602 (Timber company secretary "vaguely amused"); ER 5-1059-1060 (Congressman's staff initially "annoyed" and took photos

for scrapbook). The demonstrators were nonviolent, unarmed, and posed no safety threat to themselves or others. *E.g.* (Pet. App. C at 20a, 21a, 25a). There was no evidence of any damage to property. The demonstrators were ultimately charged with misdemeanors.

REASONS FOR DENYING THE WRIT

Notwithstanding the County defendants' misstatements about the state of both the currently applicable law and the factual record, this case presents no issue worthy of this Court's discretionary review. The Ninth Circuit has now twice reviewed the nine-day trial record from the first trial in this case and concluded that there was more than sufficient evidence for a reasonable jury to reach a verdict in favor of the plaintiff demonstrators. (Pet. App. A at 8a-9a, 12a). In its amended opinion, the Ninth Circuit carefully followed this Court's directions in *Saucier v. Katz*, 533 U.S. 194 (2001), to evaluate excessive force claims in light of the policies underlying the qualified immunity doctrine. Applying *Saucier*, the Ninth Circuit once again concluded that the district court's entry of judgment as a matter of law against the demonstrators was erroneous. (Pet. App. A at 8a-12a). As with their initial petition, the County defendants' arguments in support of review are based on their disagreement with that conclusion.[1]

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[1] The County defendants' arguments in support of their petition are largely based on their disagreement with the demonstrators' evidence and with the Ninth Circuit's application of the well-established *Graham* standard to the disputed factual record. As such, this case is ill suited for review by this Court. *See* SUP. CT. R. 10 (indicating that petitions are rarely granted when asserted error

(Continued on following page)

Moreover, the County defendants' suggestion that this case presents an opportunity to resolve a conflict among the circuits concerning the meaning of "clearly established law" is now particularly inapt. That conflict has already been resolved by this Court in *Hope v. Pelzer*, 122 S. Ct. 2508 (2002).

Thus, the sole issue here is still whether the demonstrators have presented evidence sufficient to preclude entry of a Rule 50 judgment as a matter of law on both the County defendants' affirmative defense of qualified immunity and on the demonstrators' own Fourth Amendment claims, and to permit the demonstrators to finally have this case resolved by a jury. On both of these issues, the Rule 50 standard requires, and always has required, that the courts view the facts in the light most favorable to the demonstrators, who are the non-moving parties. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000); *accord Hope v. Pelzer*, 122 S. Ct. 2508, 2512 n.1 (2002); *Saucier*, 533 U.S. at 201. Given the extensive evidence of the excruciating pain and emotional distress visited upon the demonstrators by the defendants' repeated use of pepper spray in circumstances where such force was "unnecessary to subdue, remove, or arrest the protestors," (Pet. App. A at 9a), the Ninth Circuit properly concluded that the defendants were not entitled to qualified immunity. Reasonable officers would have known that this conduct was "*plainly* in excess of the force necessary under the circumstances." (*Id.* at 12a) (emphasis added).

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involves "erroneous factual findings or the misapplication of a properly stated rule of law").

I.

THIS CASE PRESENTS NO IMPORTANT ISSUES OR CONFLICTS OF LEGAL AUTHORITY REGARDING QUALIFIED IMMUNITY DOCTRINE OR FOURTH AMENDMENT LAW AND IS THEREFORE NOT WORTHY OF THIS COURT'S REVIEW.

A. THE HOLDING IN *SAUCIER v. KATZ* MERELY PRECLUDES COURTS FROM CONFLATING THE REASONABLENESS INQUIRY UNDER THE FOURTH AMENDMENT LAW GOVERNING EXCESSIVE FORCE CLAIMS AND THE QUALIFIED IMMUNITY ANALYSIS.

The primary issue addressed in *Saucier v. Katz* was whether courts should analyze the Fourth Amendment reasonableness standard for excessive force claims coextensively with the qualified immunity doctrine's reasonableness standard. *Saucier*, 533 U.S. at 197. In that case, law enforcement officials detained the plaintiff after he unfurled a banner on a military base and began to approach the Vice President of the United States. *Id.* at 198. The officers then removed plaintiff from the scene, "half-walking, half-dragging" him away and shoving him into a van during the course of a lawful arrest. *Id.* The plaintiff conceded that he was not hurt, though there were some disputed facts about the government's interest in removing him in the manner alleged. *Id.* The defendant officer filed a summary judgment motion, seeking dismissal of the case on the affirmative defense of qualified immunity. *Id.* at 199. The court of appeals rejected the officer's claim, concluding that the reasonableness tests under both the Fourth Amendment and the qualified immunity doctrine were identical inquiries, and that a material factual dispute concerning the reasonableness of an officer's

behavior necessarily precluded summary judgment on both issues. *Katz v. United States*, 194 F.3d 962, 968-69 (9th Cir. 1999), *rev'd*, 533 U.S. 194 (2001).

This Court reversed the appellate court, holding that the Fourth Amendment analysis remains analytically distinct from the qualified immunity reasonableness test. *Saucier*, 533 U.S. at 204. In doing so, it pointed out that conflating the two different reasonableness inquiries might undermine the ability of officers to seek early termination of excessive force cases in which they may have violated the Fourth Amendment but their conduct did not *clearly* violate the law. *Id.* at 202. Thus, it suggested that courts should not reflexively deny summary judgment "*any* time a material issue of fact remains on the excessive force claim." *Id.* (emphasis added).

The Court then elaborated on the procedure that lower courts must apply in adjudicating summary judgment motions asserting qualified immunity in excessive force cases. It held that courts must first decide the threshold question of whether "*[t]aken in the light most favorable to the party asserting the injury*, . . . the facts alleged show the officer's conduct violated a constitutional right."[2] 533 U.S. at 201 (emphasis added). Under this procedural structure, if a court cannot conclude that the factual record, even viewed in the light most favorable to the plaintiff, established a claim for relief, the case ought to be dismissed on summary judgment. *Id.* This aspect of the Court's decision is, of

[2] Extending the reasoning articulated in *Wilson v. Layne*, 526 U.S. 603, 609 (1999), the Court suggested that first addressing the plausibility of the plaintiff's claim for relief on the merits would fulfill the courts' function of elaborating the law on a case-by-case basis. *Saucier*, 533 U.S. at 201.

course, consistent with years of precedent articulating the appropriate standard for adjudicating summary judgment motions and other judgments as a matter of law. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000) (Rule 50 judgments); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985) (Rule 55 summary judgments). Moreover, implicit in the *Saucier* Court's analysis is that in order to survive a summary judgment motion (or a motion for judgment as a matter of law), the factual record must be sufficient to sustain the plaintiff's claim before a reasonable jury. *Reeves*, 530 U.S. at 149.

The Court next concluded that if the plaintiff's allegations are sufficient to set forth a constitutional violation, the court should then examine whether that right was "clearly established" at the time of the official's conduct. *Saucier*, 533 U.S. at 201. This requires the court to determine whether "it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*" *Id.* at 202 (emphasis added) (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). Again, this aspect of the holding in *Saucier* did not create a sea change in the law of qualified immunity. It has been clear at least since *Anderson v. Creighton*, 483 U.S. 635, 639 (1987), that a plaintiff may not defeat a qualified immunity defense simply by pleading that a clearly established right exists at a high level of generality (*e.g.*, a clearly established right to not be subject to excessive force). *Saucier* merely reaffirms this. 533 U.S. at 201-02. At the same time, as this Court has once again reiterated, the plaintiff need not allege that the precise action in question has previously been declared unconstitutional in order to defeat a qualified immunity claim. *Hope v. Pelzer*, 122 S. Ct. 2508, 2515 (2002); *Anderson*, 483 U.S. at 640.

In evaluating *Saucier*'s impact on the law, it is important also to understand what it did *not* hold. The opinion in *Saucier* suggests that this Court was concerned with the issue of whether the ultimate conclusion on reasonableness in excessive force cases must *always* go to the jury whenever there are factual disputes. *Saucier*, 533 U.S. at 197. But *Saucier* clearly did not hold that summary judgment on the qualified immunity defense must *always* be granted in excessive force cases. Rather, this Court clarified that in some circumstances an officer may commit a violation of the Fourth Amendment's guarantee against use of excessive force, but have been reasonably mistaken in whether his or her actions crossed the line between lawful and unlawful conduct. *Id.* at 205-07. That is, *in close cases*, an officer may be entitled to qualified immunity even when the facts are read in the light most favorable to the plaintiff. As the Ninth Circuit's careful analysis of the extensive factual record here illustrates, this case is not a close one.

B. THE NINTH CIRCUIT PROPERLY CARRIED OUT ITS DUTY TO RECONSIDER ITS ORIGINAL DECISION IN LIGHT OF THE SUPREME COURT'S DECISION IN *SAUCIER v. KATZ*.

The Ninth Circuit's decision is entirely consistent with what *Saucier* demands. Neither the controlling legal standards governing Rule 50 nor the controlling Fourth Amendment law has been altered by *Saucier*. *Saucier* merely clarifies that the reasonableness analysis under Fourth Amendment law is distinct from the reasonableness inquiry under qualified immunity and establishes a procedural structure for evaluating summary judgment motions that involve both of these issues.

1. The Ninth Circuit Properly Applied *Saucier* by Addressing the Threshold Question of Whether the Demonstrators Presented Sufficient Evidence upon Which a Reasonable Jury Could Conclude That the County Defendants' Use of Pepper Spray Violated the Demonstrators' Fourth Amendment Rights.

As *Saucier* instructs, the Ninth Circuit appropriately asked the threshold question – whether "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." *Saucier*, 533 U.S. at 201. The court concluded, as it had in its original opinion, that "a rational juror could conclude that the use of pepper spray against the protestors constituted excessive force."[3] (Pet. App. A at 8a).

There is no dispute that in carrying out this analysis, the Ninth Circuit applied the reasonableness standard established in *Graham v. Connor*, 490 U.S. 386 (1989). *Graham* requires courts adjudicating excessive force claims to balance the "'nature and quality of the intrusion'" occasioned by the police's particular use of force against the government's need to use force in the circumstances of the case. *Id.* at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8 (1985), quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). In assessing the government's interests, *Graham* requires examination of: 1) "the severity of the

[3] As the Ninth Circuit noted, this Court's remand order did not require reconsideration of the original panel decision to reverse the trial court's entry of judgment as a matter of law for the City and their respective police departments. (Pet. App. A at 4a n.2). Thus, it adopted the extensive reasoning on the Fourth Amendment issues carried out in its original decision. *Id.*

crime at issue;" 2) "whether the suspect poses an immediate threat to the safety of the officers or others;" and 3) "whether he is actively resisting arrest or attempting to evade arrest by flight."[4] 490 U.S. at 396.

As the Ninth Circuit concluded, the record includes overwhelming evidence from which a jury could conclude that the officers' use of OC on the demonstrators inflicted a severe intrusion on the demonstrators' Fourth Amendment rights. Multiple witness accounts revealed that the County defendants' application of OC to the demonstrators caused blinding, "agonizing," and "searing" pain that lasted for hours. *E.g.*, ER 2-293-294 (Lundberg); ER 7-354-355 (Tendick); ER 5-1063-1065 (Slanetz); ER 5-1228-1229 (Portugal). The County's use of OC also impaired the demonstrators' breathing and caused them to hyperventilate. *Id.*; ER 2-293-294 (Lundberg); ER 3-609 (Neuwirth); ER 4-970-971 (McCurdy). Moreover, the record includes evidence that the demonstrators also experienced prolonged emotional and psychological injuries from the harm the OC inflicted. *E.g.*, ER 2-296 (Lundberg – panic attacks); ER 3-577-578 (Sanderson-Fox – emotionally fragile, cries frequently for no reason); ER 3-616 (Neuwirth – depressed, emotional all the time, feelings of being violated); ER 3-635-636 (Burton – fear and sadness, nightmares); ER 5-1068 (Slanetz – emotionally sensitive, nightmares, less trusting, fear of police).[5]

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[4] The three factors listed in *Graham* are not exclusive, but provide a convenient framework to discuss the evidence in this case.

[5] Such injuries are clearly cognizable in § 1983 actions. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306-07 (1986) (damages for § 1983 claims may include mental anguish and suffering).

In response to this compelling evidence, the County defendants imply that the Ninth Circuit's ruling is tantamount to a ruling that excessive force claims can be proven even where there is "no direct contact" between an officer and arrestee and "which involves no physical injury or even risk of physical injury to the arrestee." (Pet. at 16). They appear to urge this Court to promulgate a general rule that an excessive force plaintiff must show that government officials have inflicted a physical wound of some sort. Such a general rule would conflict with *Graham*'s mandate to balance the intrusion on a citizen's rights against the governmental interest at stake. Worse, such a rule would also allow law enforcement officers to inflict enormous pain on citizens through methods such as electric shock, choke holds, or OC, as long as inflicting that pain left no marks, and regardless of whether there was any legitimate governmental justification. Such a general rule would also ignore the fact that a person is quite obviously harmed when subjected to severe, agonizing pain.[6]

Both the Ninth Circuit's amended decision and its original panel decision also carefully walked through each of the County's possible justifications for the use of OC on the peaceful demonstrators. (Pet. App. A at 9a-10a; Pet. App. C at 38a-45a). On each point, the court properly concluded that a reasonable jury could find that the evidence did not support the County's arguments about

[6] It is worth noting that although the County defendants' make much of this Court's admonition that "not every push or shove . . . violates the Fourth Amendment," *Graham*, 490 U.S. at 396, implicit in the Court's statement is that some pushes and shoves *may* violate the Fourth Amendment, depending on the context.

the necessity for use of pain-inducing chemical agents to effect the demonstrators' arrests. This conclusion is supported by this Court's statement that "although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000).

Considering the factors mentioned in *Graham*, a reasonable jury could conclude from the evidence that the general governmental interest at stake in this case was minimal, and that the governmental interest in using OC was even less. Regarding "severity of the crime," the demonstrators were ultimately charged with misdemeanors, not felonies.[7] *See Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir.) (noting misdemeanors less severe than felonies in analyzing Fourth Amendment violation), *cert. denied*, 502 U.S. 980 (1991). Even the trespasses associated with the demonstrations did not appear to cause great disruption. Second, a reasonable jury could also find that the demonstrators posed absolutely no threat – "immediate" or otherwise – to anyone. The demonstrators were passive, nonviolent, and unarmed. Videos; (Pet. App. A at 27a). There is no evidence that any demonstrator threatened the officers or anyone else. On the contrary, there is

[7] The district court found that the government had an interest in "protecting the property rights of lawful occupants." Order at 8-9, ER 6-1419-1420. This element is included in *Graham*'s "severity of the crime" factor. However, there was no actual evidence of any property damage at any of the protests. Indeed, as discussed in the text, there was evidence from which a jury could infer, contrary to the district court's determination, that the intrusion on property rights was minimal.

evidence that the demonstrators smiled at and talked with the officers on the scene. ER 5-1061 (Slanetz).[8] Finally, the record showed that while the officers inflicted great pain when they applied OC, the use of the chemical agent did little or nothing to expedite the arrest of the demonstrators. Pacific Lumber Video (separating with tools takes about 8 minutes); ER 3-613 (Neuwirth); ER 2-462 (Held – 7 or 8 minutes to cut contraption). The demonstrators presented evidence that officers could and did use tools to safely unlink them. Pacific Lumber Video; ER 2-465-467 (Held – acknowledging fire risk from tools can be mitigated); ER 4-813 (no fire danger present at Pacific Lumber); ER 6-1270-1271 (Reynolds – past use of grinders did not cause serious injury or fire). The Ninth Circuit thoroughly examined this evidence and concluded that there was undoubtedly sufficient evidence presented in this case to allow it to be heard by a jury and from which a jury could find a cognizable intrusion on the demonstrators' Fourth Amendment rights. Given this Court's admonition that in Rule 50 motions, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence,"

[8] The record likewise does not support the County's claims that its actions were justified by any exigencies. As the Ninth Circuit pointed out, the only exigency the officers testified about was the demonstrators' use of the "black bear" devices to immobilize themselves. (Pet. App. C at 43a). But the evidence showed that before the officers even arrived at the scenes of the demonstrations, the County had decided to use OC indiscriminately on any demonstrator using a lock-down device. ER 4-483 (Lewis); (Pet. App. A at 6a, 29a). A reasonable jury reviewing this evidence could surely disbelieve the County's assertion of an emergency. *Reeves*, 530 U.S. at 151 (courts reviewing Rule 50 motions must disregard all evidence favorable to the moving party that the jury is not required to believe).

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150 (2000), the Ninth Circuit's decision was entirely appropriate and review by this Court is unwarranted.

2. The Ninth Circuit Properly Applied *Saucier* by Addressing the Second Question of Whether the Demonstrators Presented Sufficient Evidence That the County Defendants' Use of Pepper Spray Violated the Demonstrators' Clearly Established Fourth Amendment Rights.

Carefully adhering to this Court's decision in *Saucier*, the Ninth Circuit then turned to the second component of the qualified immunity analysis. As indicated above, this aspect of *Saucier* holds that in reasonably close cases, an officer is entitled to qualified immunity where his conduct did not violate clearly established rights, even when the facts read in the light most favorable to the plaintiff establish that a constitutional violation occurred. *Saucier*, 533 U.S. at 205-07. The Court indicated that a right is clearly established where "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Id.* at 202.

In order to analyze whether a reasonable officer could have believed his or her conduct violated a clearly established right, however, courts must always examine the facts, including the information available to the officers at the time of their conduct. *Id.* at 207. No law can be clearly established entirely in the abstract regardless of the factual circumstances. *See* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 39 (1997). Furthermore, though the Court does not make this

point explicit, courts applying this standard must read it in light of the procedural standard for assessing judgments as a matter of law under Rules 50 and 55. That is, in order to assess the propriety of a judgment as matter of law against the plaintiff on a qualified immunity claim, the facts must still be read in the light most favorable to the non-moving party. *Reeves*, 530 U.S. at 150-51.

As with its earlier qualified immunity cases, the Court's articulation of the applicable standard is consistent with the policies underlying qualified immunity, which include facilitating early termination of weak cases or cases where the law truly did not telegraph the conclusion that particular conduct would be considered unconstitutional. *Saucier*, 533 U.S. at 202. The application of this reasonableness standard is designed to ensure that officers are on fair notice that their conduct may subject them to suit. *Hope v. Pelzer*, 122 S. Ct. 2508, 2515 (2002); *Saucier*, 533 U.S. at 206. Thus, *Saucier* gives illustrations of cases in which qualified immunity might protect an officer whose conduct might have nevertheless violated the *Graham* Fourth Amendment standard. For example, an officer might use too much force where he "reasonably, but mistakenly, believed that a suspect was likely to fight back." *Id.* at 205. Similarly, officers "can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances" that would otherwise justify their conduct. *Id.* at 206. Nevertheless, this Court recently reemphasized that "general statements of the law," such as the *Graham* balancing test, "are not inherently incapable of giving fair and clear warning" to officers. *Hope*, 122 S. Ct. at 2516 (citing *United States v. Lanier*, 520 U.S. 259, 270-71 (1997)).

The extensive evidentiary record in this case amply shows that the County defendants knew or should well have known that "in the situation [they] confronted," the repeated use of a chemical agent that caused intense physical pain on demonstrators who presented no danger to themselves or others violated clearly established Fourth Amendment law. Based on this record, the Ninth Circuit concluded that multiple factors suggested that a reasonable officer would have known that the conduct in this case violated the Fourth Amendment. Indeed, the violation was quite obvious. *Cf. Hope*, 122 S. Ct. at 2514.

The evidence, for example, showed that not only did the officers' conduct cause immediate, searing, and long-lasting pain, but also that the application of OC was designed to cause intense pain, a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx. ER 2-235-236 (Hanson). The OC clearly affected demonstrators in precisely the way the officers knew it would. *See* ER 5-1228-1229 (Portugal–OC caused burning that got gradually worse); ER 3-674-676 (Schneider–OC caused "raging pain," interfered with breathing, caused demonstrator to knock his head against stump because pain was so excruciating).

Furthermore, a reasonable jury could conclude that the County's use of OC was calculated to have maximum impact. The record details the unorthodox and direct manner in which the officers applied OC. In some instances the officers: forced the demonstrators' faces upward by pulling their heads or hair backwards; used Q-tips soaked with OC to swab the chemical onto the demonstrators' eyelids; swabbed the chemical directly onto the surface of a demonstrator's eyeball; and sprayed the chemical from inches

away directly onto demonstrators' eyes until it ran from the demonstrators' eye sockets, causing OC to quickly seep into eyeballs, noses and mouths, and onto other parts of the demonstrators' faces and bodies. *See supra* at p. 4. Moreover, as the Ninth Circuit found, the defendants administered the pepper spray repeatedly, despite the fact that the demonstrators were under control. (Pet. App. A at 10a).

In addition, the defendants used full blasts of the pepper spray on the demonstrators, in spite of the fact that the manufacturer warned against such use (Pet. App. A at 10a), and that the County's deputy in charge of chemical agent training testified that spraying OC into a person's face from less than 3 feet is not safe. ER 2-275-276 (Hanson). These officials also knew that the direct swabbing method was not used anywhere else in the United States and that the California Highway Patrol specifically prohibits the use of OC in this manner. ER 3-518 (Lewis). *Cf. Hope v. Pelzer*, 122 S. Ct. 2508, 2518 (2002) (stating that the Court's conclusion that reasonable officers would have known that their conduct was unconstitutional was buttressed by the fact that a government agency had condemned the practices involved).

Finally, as the Ninth Circuit concluded, the defendants used the OC on the demonstrators even though the demonstrators "were sitting peacefully, were easily moved by the police, and did not threaten or harm the officers." (Pet. App. A at 10a). Moreover, the credibility of the defendants' argument that they acted with a "reasonably mistaken belief" about the lawfulness of their conduct is diminished by the admissible evidence from which a reasonable jury could conclude that the defendants used OC to punish the demonstrators for protesting. *E.g.*, (Schneider – during Riggs protest, officer said "Jennifer,

haven't you told your friends what we're going to do to you today?"); ER 5-1063 (Slanetz – officer said "Let your friends know what this feels like.").

In contrast to the substantial evidence showing the excruciating pain and emotional distress suffered by the demonstrators, the record reflects little, if any, evidence supporting the County defendants' interests in using this level of force in the context of peaceful, passive demonstrators who were committing trespass. As indicated above, the demonstrators were not charged with any serious criminal offense and their actions appear to have caused, at most, mild inconvenience at the three sites. ER 3-602 (Neuwirth – Pacific Lumber secretary "vaguely amused" by demonstration); ER 5-1059-1060, 1065 (Slanetz – Congressman's staff initially "annoyed" but later took photographs for Congressman's scrapbook; Congressman's staff was "walking around" and "answering the phone and talking"). The trial evidence showed that the demonstrators were nonviolent and unarmed and that they posed no safety threat to themselves or others. (Pet. App. A at 6a, 7a, 10a 27a, 28a, 32a); *E.g.*, Videos; ER 2-283 (Lundberg); ER 2-381 (Tendick). There was no evidence of any damage to property at any of the protests.

Thus, the record in this case shows substantial evidence to suggest that it would have been clear to the County defendants' that their conduct was unlawful in the situation they confronted. *Saucier*, 533 U.S. at 202. In contrast, the Court's application of this standard to grant qualified immunity in *Saucier*, which presented a much closer case than this one, was clearly warranted. In *Saucier*, for example, the *plaintiff's own version* of the facts demonstrated that the officer's force "was *not so excessive* that [plaintiff] . . . *suffered hurt* or injury. *Id.* at 198, 209

(emphasis added). Thus, under any formulation of the law, it would have been difficult for the plaintiff in *Saucier* to survive a summary judgment motion.[9]

Another important distinction is that the government interests at stake in *Saucier* were materially greater than in the present case. The plaintiff in *Saucier* was engaged in a protest during which, as the Court repeatedly emphasized, he began to physically approach the Vice President of the United States. 533 U.S. at 198 (plaintiff unfurled banner and began moving from front row of seating area toward speaker's platform). This Court noted that the reasonableness calculation in that context had to take into account the important governmental interest in ensuring the security of the Vice President. *Id.* at 208 (officer "did not know the full extent of the threat [plaintiff] . . . posed or how many other persons there might be who, in concert with [plaintiff] . . . , posed a threat to the security of the Vice President. . . . [Officer] . . . was required to recognize the necessity to protect the Vice President by securing [plaintiff] . . . and restoring order to the scene.").

Again, *Saucier* clearly did not hold that summary judgment asserting the qualified immunity defense must *always* be granted in an excessive force case. Such a reading of that case would convert qualified immunity into absolute immunity. *Saucier* merely states that officers are entitled to early dismissal of cases against them where the relevant legal standard as applied to the situation they

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[9] An important, but overlooked, aspect of the record in *Saucier* is that there was substantial doubt whether the defendant was even the actual officer who shoved the plaintiff, a central element of the excessive force claim. *See Saucier*, 533 U.S. at 211-12 (Ginsburg, J., concurring in the judgment).

confronted did not suggest a clear violation of the law. In the present case there is much evidence to suggest that the County defendants confronted a situation in which they clearly used more force than was reasonably necessary, and that they should have known this conduct was unlawful.

Moreover, at the very least, the record reflects genuine disputes over facts material to resolving the County defendants' qualified immunity claims. Although one of the principal functions of the defense is to provide for early termination of insubstantial claims, *Saucier*, 533 U.S. at 200, this Court has always understood that there are some situations in which factual disputes preclude resolution of a qualified immunity claim on summary judgment. *See Anderson*, 483 U.S. at 646 n.6 (acknowledging that if plaintiff's alleged facts differ from defendant's version of the facts for purposes of assessing defendant's reasonableness, discovery may be necessary before qualified immunity can be adjudicated); *Johnson v. Jones*, 515 U.S. 304, 307 (1995) (establishing an exception to the rule allowing interlocutory appeals of orders denying qualified immunity where the basis of the denials is a dispute about the underlying facts). *See generally* Chen, *supra*, 47 AM. U. L. REV. at 90-98. Moreover, the complication of material fact disputes is in no way limited to excessive force cases. *See, e.g.*, *Gardenhire v. Schubert*, 205 F.3d 303, 311 (6th Cir. 2000) (observing that in a wrongful arrest case some qualified immunity claims cannot be resolved before trial if the immunity claim itself turns on disputed facts).

Here, many material facts relating specifically to the qualified immunity claims remain in dispute, precluding their final determination at this point. As the Ninth Circuit observed in its original panel opinion, there are

numerous historical factual disputes relating not only to the amount of force used and the justifications for that force, but also to Sheriff Lewis's and Chief Deputy Philp's supervisory roles in implementing the policy of OC use on passive demonstrators and ensuring it was carried out by their subordinates. (Pet. App. C at 51a-52a).

The record reveals, for example, that there are fundamental disputes concerning how Lewis and Philp instructed their subordinates to apply OC. Philp testified that he gave instructions discouraging officers from the direct application of OC to the nose and mouth areas and forbidding them to apply it in close proximity to the open eyeball. (Pet. App. C at 51a). In contrast, the officer in charge at each demonstration testified that Philp and Lewis authorized full spray blasts of OC. ER 4-911-912 (Ciarabellini). These are not peripheral fact disputes, but evidentiary conflicts that go to the heart of the qualified immunity claim.

Similarly, to the extent that the County relies on facts asserting that Lewis and Philp consulted a county risk manager and the local District Attorney about the use of OC on passive demonstrators, the evidence on the nature and scope of such consultation is in dispute. For example, while there is some evidence that officers consulted with the risk manager about limited applications of OC to *cheekbones*, the risk manager herself testified that she was never consulted about the types of applications that actually occurred. ER 6-724, 3-729 (Risk Manager Kerr – discussed application below eye, on cheekbone; no discussion of a full spray). The risk manager also disputes the actual extent of any consultation. *Id.*; (Pet. App. C at 52a). In addition, the County presented some evidence that Lewis and Philp were concerned enough about the use of

OC in this unprecedented context to ask the District Attorney for an opinion regarding the officers' potential criminal liability. As the evidence shows, however, the District Attorney limited the opinion to criminal culpability, and advised them to obtain a separate and independent opinion on the potential civil liability exposure. ER 3-507 (Lewis); ER 5-993, 5-998 (Philp).[10] These facts should also be viewed in light of the fact that the California Highway Patrol specifically prohibited the use of OC in the manner in which the officers used it on the demonstrators. ER 3-518 (Lewis); *cf. Park v. Shiflett*, 250 F.3d 843, 852-53 (4th Cir. 2001) (rejecting qualified immunity for officer who sprayed pepper spray in eyes of non-threatening suspect at close range, in violation of department's rules and regulations). Because these disputed facts go directly to the validity of the underlying basis for qualified immunity, early resolution of the qualified immunity claim is simply not possible in this procedural posture.

Indeed, while it is not the norm, it is also not uncommon for qualified immunity claims to require some factual findings at the trial stage before they can be resolved. *See, e.g., Martin v. Heideman*, 106 F.3d 1308, 1310-11 (6th Cir. 1997); *Sloman v. Tadlock*, 21 F.3d 1462, 1467 (9th Cir. 1994). Given this precedent, there is little remarkable

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[10] In any event, the fact that a public official seeks legal advice is not determinative of whether the law was clearly established at the time of the allegedly unconstitutional act. *See Cannon v. City and County of Denver*, 998 F.2d 867, 874 (10th Cir. 1993); *V-1 Oil Company v. State of Wyoming*, 902 F.2d 1482, 1488 n.5 (10th Cir.), *cert. denied*, 498 U.S. 920 (1990). The law was either clearly established, or it was not.

about the Ninth Circuit's holding, and certainly nothing worthy of this Court's full review.

II.

THE NINTH CIRCUIT'S APPLICATION OF THE QUALIFIED IMMUNITY STANDARD CONFORMS TO CONTROLLING SUPREME COURT AUTHORITY

In an attempt to come up with a claim worthy of this Court's attention, the County defendants assert that the Ninth Circuit's decision improperly applied the qualified immunity standard in two ways. First, they argue that the Ninth Circuit's decision reflects confusion among the lower courts as to the precision at which a right must be defined in order to be clearly established. (Pet. at 27-30). Second, they erroneously assert that the Ninth Circuit relied entirely on a decision published subsequent to the events in this case in concluding that the law governing use of pepper spray on passive demonstrators was clearly established. (Pet. at 21-27). Neither of these contentions is supportable.

Regarding the first argument, to the extent that lower courts had any disagreement about the degree of similarity that previous cases must bear to present cases in order to create a "clearly established" right for purposes of qualified immunity, this Court resolved all doubts about the appropriate standard in *Hope v. Pelzer*, 122 S. Ct. 2508 (2002). In *Hope*, the Court rejected the defendants' argument that plaintiffs must cite precedent with "materially similar facts" to the instant case as an unnecessarily "rigid gloss" on the law of qualified immunity. *Id.* at 2515. Moreover, as the Court illustrated in applying the qualified immunity standard in that case, constitutional rights can be clearly established not only by the holdings of extant cases, but also by their reasoning. *Id.* at 2517. The

message from this Court's well-reasoned decision in *Hope* is clear. Qualified immunity does not protect officials from suit where their conduct is unprecedented, but the contours of the law put them on more than adequate notice that their conduct crosses the boundaries between lawful behavior and unconstitutional conduct. That was clearly the case here, and the Ninth Circuit's decision unquestionably anticipated this Court's holding in *Hope*.

The defendants' second argument rests on a misreading of the Ninth Circuit's amended opinion. A careful reading of that decision reveals that its conclusion that the law governing excessive force in the context of the application of pepper spray to passive demonstrators was clearly established, was both appropriate and in conformity with the law set forth by this Court.

First, while the court's original manner of citing *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000), might have caused some confusion, its amended opinion makes clear that its conclusion that the law was clearly established relies upon law that pre-dated the incidents in this case. (Pet. App. A. at 11a). The court appropriately referred to *LaLonde* as being in harmony with its conclusion that the law was clearly established, but its decision on remand in this case essentially ratified its initial conclusion from the original panel decision that the law has been clearly established since well before the incidents at issue in this case. In its original decision, the Ninth Circuit held that the law clearly established that uses of extreme force in the face of little or no resistance, without regard to the particular method used to inflict that force, violated the Fourth Amendment. (Pet. App. C at 48a) (citing *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir.1994)). In doing so, the court cited precisely the same

Ninth Circuit precedent relied upon in *LaLonde* to support the conclusion that the law *in this context* was clearly established. *Compare* Pet. App. C at 48a (citing *Mendoza*) *with LaLonde*, 204 F.3d at 961 (citing *Mendoza*). Thus, both cases relied on law preexisting *either* decision in determining that use of pepper spray on victims who were causing no danger to themselves or others was a clear violation of Fourth Amendment principles.[11]

Second, as in *LaLonde*, the Ninth Circuit decision in this case relies upon the background of law established in other excessive force cases. *LaLonde* itself did not rely on a specific case involving pepper spray, but instead concluded that the contours of the rights established by the Fourth Amendment were sufficiently clear that a reasonable officer would have known that the use of OC on a person who is not a danger to himself or others is unreasonable. 204 F.3d at 961.[12] Both this case (Pet. App. A at 11a), and

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[11] As they have done throughout years of briefing in this case, the County defendants misunderstand the Ninth Circuit's holding in *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994), citing it as the "controlling authority" upon which they relied in authorizing the use of OC on passive demonstrators. (Pet. at 22). In *Forrester*, the Ninth Circuit heard an appeal to determine whether sufficient evidence supported a jury's verdict that police officers' use of force against a large number of demonstrators in a specific context was reasonable. *Forrester*, 25 F.3d at 805-809. *Forrester* merely held that in that case there was sufficient evidence on which a reasonable jury could have found that the use of force was reasonable. Thus, it is actually consistent with the demonstrators' claim here – that the jury plays a crucial role in excessive force cases, even after *Saucier*.

[12] What is more, the Ninth Circuit in *LaLonde* concluded that the law of excessive force in the context of use of pepper spray on passive persons was clearly established at the time of the incidents in that case, which occurred more than a year before the County defendants' use of pepper spray on the demonstrators in this case. *LaLonde*, 204 F.3d at

(Continued on following page)

LaLonde properly apply this Court's understanding of qualified immunity doctrine, which makes it clear that plaintiffs need not cite to a specific case identical to the one at bar in order to support their claim that a particular constitutional right is clearly established. *Hope v. Pelzer*, 122 S. Ct. 2508, 2515 (2002); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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961 (holding that law enforcement officers in *July 1996* should have known that "in a situation in which an arrestee surrenders and is rendered helpless, any reasonable officer would know that a continued use of the weapon or a refusal without cause to alleviate its harmful effects constitutes excessive force.").